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No. 81-18

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

PERRY EDWARD WOOLRIDGE - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Writ of Certiorari to the
Supreme Court of Kentucky

REPLY BRIEF FOR PETITIONER

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August 13, 1981

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v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

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REPLY BRIEF FOR PETITIONER

The Respondent has raised several arguments in its Brief in Opposition which merit reply:

First, Respondent suggests and would have this Court believe that Petitioner has failed to satisfy the jurisdiction requirements for seeking a Writ of Certiorari to the Supreme Court of Kentucky. Respondent alleges that "the application of state law by the Supreme Court of Kentucky does not raise a federal question for review by this honorable court." [Respondent's Brief in opposition, p. 2.]

Petitioner submits that the jurisdiction requirements of 28 U.S.C. §1257(3) have been satisfied beyond doubt. That section gives this court jurisdiction to review, by Writ of Certiorari, a state court decision that denies a petitioner a right or privilege claimed

under the Constitution of the United States of America. The statute provides in relevant part as follows:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) by writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, *or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.* [Emphasis added.]

The Petitioner has been denied his right to a fair and impartial trial as guaranteed by the Sixth Amendment of the United States Constitution and his right to due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution by the Supreme Court of Kentucky's interpretation of state law. Therefore, this Court has inherent jurisdiction under Title 28 U.S.C.S. §1257(3) to review that decision.

This Court also has jurisdiction to review the Supreme Court of Kentucky's opinion under Rule 17 of this Court. That rule provides in relevant part that a Writ of Certiorari may be granted when a state court has decided an important question of federal law which has not been, but should be settled by this Court.

1. A review on certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered.

   (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court.

This Court has never determined under what circumstances a trial court may reform and accept an unintelligible verdict in open court so as not to deny a defendant his Sixth Amendment right to trial by a fair and impartial jury and his Fourteenth Amendment right to Due Process of Law. Therefore, this Court has jurisdiction to settle this important question of federal law.

Secondly, the Respondent suggests that the procedure used by the Trial Court in correcting a patently unintelligible verdict in open court is acceptable under Kentucky law. As authority for this proposition, the Commonwealth cites *Bledsoe* v. *Commonwealth,* 10 Kentucky Law Reports 909, 11 S. W. 84 (1889) and *Mathis* v. *Commonwealth,* Ky., 447 S.W. 2d 641 (1969).

Petitioner submits that these cases do not lend any support to the Respondent's suggestion that the Trial

Court's decision to reform and accept a patently unintelligible verdict in open court was acceptable under Kentucky law. In *Bledsoe,* the jury was instructed that if they found the defendant guilty of murder, the sentence was to be death to life imprisonment; and if they found the defendant guilty of manslaughter, the maximum penalty was 21 years imprisonment. The jury returned a verdict of guilty of murder and fixed his sentence at 99 years in prison. In open court the trial judge reformed the verdict sentence to life imprisonment. The Court reasoned that it was manifest that the jury had found the defendant guilty of the crime and had attempted to fix his punishment at confinement in the state penitentiary for life since confinement in the penitentiary for 99 years, according to all human probabilities was equivalent to a life sentence.

> It is manifest that the jury understood these instructions, and that they found the appellant guilty of the crime of murder, and attempted to fix his punishment at confinement in the state penitentiary for life: and that, in fixing his punishment in the penitentiary for 99 years, it was according to human probabilities equivalent to a life sentence. *Bledsoe, Id.,* at 11 S. W. 85.

The instant case is totally different from *Bledsoe* since there is absolutely no human probability that the jury intended, by writing out on their verdict form that the Petitioner be sentenced to somewhere between 10 and 20 years in the penitentiary, to fix the Petitioner's

punishment at 20 years in the penitentiary. In short, there was absolutely no way for the Trial Court to determine, from the four corners of the verdict form, the jury's intention as to the amount of punishment to be prescribed.

In *Mathis,* there were two defendants and the jury returned a verdict which read: "we the jury have recommended a sentence for one year and recommend judge to probate for five years. Signed, J. R. Booker, Foreman." *Id.,* at p. 643. The judge reformed this verdict in open court to read as follows: "we the jury find both defendants guilty and fix their punishment at one year in the penitentiary." *Id.,* at p. 644. The trial court in that case reformed the verdict by properly reasoning that the jury could not have intended to fix the defendants' punishment without finding that both defendants were guilty.

> We think the action of the trial court simply made the verdict conform to the intention of the jury. *The jury did not intend to fix their punishment without a finding that they were guilty.* [Emphasis added.] [Citation omitted.] *Id.,* at p. 644.

It is obvious that *Mathis* is inapplicable to this case since it was impossible for the Trial Court to have determined the jury's intention from the face of the jury verdict form.

Third, the Respondent suggests that "the impression that the Appellant would benefit financially by having Mr. Olive out of business was clearly presented by the Petitioner himself (T.E. 305-307, Appendix B)"

[Respondent's Brief in Opposition, p. 9.] This is not true. The testimony cited by Respondent in no way, either directly or indirectly, indicates that the Petitioner would derive a benefit from the death of Mr. Olive. On the contrary, this testimony only indicates that there was, indeed, a lessor-lessee relationship between the Petitioner and the decedent.

Fourth, the Respondent suggests that there is no prejudice created by the prosecutor's remark that the Petitioner and Respondent were partners in business. They contend that "such is not a necessary inference from the prosecutor's statement, and upon review, cannot be inferred." [Respondent's Brief in Opposition, p. 9.]

This is not true. Petitioner submits that the only logical and necessary inference that can be drawn from the highly prejudicial remarks of the prosecutor is that the Petitioner stood in a position to enjoy financial gain from the death of his alleged partner through insurance proceeds or a complete takeover of the business.

For the reasons set forth above and for those reasons enumerated in Petitioner's Writ of Certiorari, it is in the interest of justice and fundamental fairness that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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